



**BILLING CODE 3510-22-P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 648**

**[Docket No. 181031994-9022-02]**

**RIN 0648-XG608-X**

**Magnuson-Stevens Act Provisions; Fisheries of the Northeastern United States; Atlantic Herring Fishery; Adjustment to Atlantic Herring Specifications and Sub-Annual Catch Limits for 2019**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** This action implements an in-season adjustment to the Atlantic herring specifications and sub-annual catch limits for 2019. These adjustments are necessary to reduce 2018 herring catch limits that would otherwise remain in effect for 2019. This action is expected to prevent overfishing of the herring resource and lower the risk of the stock becoming overfished.

**DATES:** Effective [*insert date of date of publication in the FEDERAL REGISTER*].

**ADDRESSES:** Copies of this action, including the Supplemental Environmental Assessment and the Regulatory Impact Review/Initial Regulatory Flexibility Analysis (SEA/RIR/IRFA) prepared in support of this action, are available from Michael Pentony, Regional Administrator, 55 Great Republic Drive, Gloucester, MA 01930. Documents are also accessible via the Internet at: <https://www.nefmc.org>.

**FOR FURTHER INFORMATION CONTACT:** Carrie Nordeen, Fishery Policy Analyst, 978-281-9272.

**SUPPLEMENTARY INFORMATION:**

**Background**

We published a proposed rule for the in-season adjustment to Atlantic herring specifications and sub-annual catch limits (ACLs) for 2019 on November 30, 2018 (83 FR 61593). The comment period on the proposed rule ended on December 31, 2018. We received 22 comment letters on the proposed rule, which are summarized in the Comments and Responses section of this final rule.

We implemented 2016-2018 herring specifications on November 1, 2016 (81 FR 75731), as recommended by the New England Fishery Management Council. The specifications included an overfishing limit (OFL) of 111,000 mt for 2018. The acceptable biological catch (ABC) for 2018 was also set at 111,000 mt. The ABC was based on the Council's interim control rule, set equal to the OFL with at least a 50-percent probability of preventing overfishing, and consistent with the Council's Scientific and Statistical Committee's (SSC) advice. The annual catch limit (ACL) for 2018 was 104,800 mt.

In June 2018, a new Northeast Regional Stock Assessment Workshop (SAW) for herring, reviewed by the Stock Assessment Review Committee (SARC), was completed. The assessment concluded that although herring was not overfished and overfishing was not occurring in 2017, poor recruitment would likely result in a substantial decline in herring biomass. The stock assessment estimated that recruitment had been at historic lows during the most recent 5 years (2013-2017). The assessment projected that biomass could increase, after reaching a low in 2019, if recruitment returns to average levels, but that herring catch would need to be reduced, starting

in 2018, to prevent overfishing and lower the risk of the stock becoming overfished. The final assessment summary report is available on the Northeast Fisheries Science Center (NEFSC) website ([www.nefsc.noaa.gov/publications/](http://www.nefsc.noaa.gov/publications/)).

The Atlantic Herring Fishery Management Plan (FMP) allows NMFS to make in-season adjustments to the herring specifications and sub-ACLs to achieve conservation and management objectives, after consultation with the Council, consistent with the Herring FMP's objectives and other FMP provisions. In August 2018, at the request of the Council, we used an in-season adjustment to reduce the 2018 ACL from 104,800 mt to 49,900 mt to reduce the risk of overfishing in 2018 (83 FR 42450, August 22, 2018). This resulted in at least a 50-percent probability of preventing overfishing projected for 2018. However, assessment projections indicated that catch would need to be further reduced in 2019 to prevent overfishing and lower the risk of the stock becoming overfished.

By regulation, herring catch limits for 2018, as modified by the 2018 in-season adjustment, remain in effect until replaced. At its September 2018 meeting, the Council adopted a new ABC control rule for the herring fishery developed in Amendment 8 to the Herring FMP and requested we use an in-season adjustment to reduce 2018 herring catch limits for 2019 while it develops new specifications starting in 2020. The Council was scheduled to begin developing the 2019-2021 herring specifications at its September meeting and take final action on the new specifications at its December 2018 meeting. The Council planned for us to implement the new specifications during 2019, based on the new ABC control rule it adopted in Amendment 8. However, because of the time required for the Council to prepare the necessary documentation and for us to review and approve the control rule in Amendment 8 and implement final approved

measures, the new specifications would not have been effective early enough to prevent catch from exceeding the lower catch limits required to prevent overfishing in 2019.

To assist us with developing the 2019 in-season adjustment, the Council discussed options for 2019 catch limits at its September 2018 meeting and recommended that we:

- Use the most recent assessment and projections to develop the 2019 specifications;
- Use the ABC control rule approved by the Council in Amendment 8;
- Maintain the sub-ACLs for herring management areas based on the proportions allocated in the 2016-2018 specifications package, including;
  - Area 1A: 28.9 percent,
  - Area 1B: 4.3 percent,
  - Area 2: 27.8 percent,
  - Area 3: 39 percent;
- Proportionally reduce the fixed gear set-aside allocation which is based on a small weir fishery west of Cutler, ME; and
- Set the border transfer (which allows U.S. vessels to transfer herring to Canadian vessels to be processed as food) at 0 mt.

The SSC met on October 10, 2018, to review the recent herring stock assessment and consider herring catch limits. The term of reference for the meeting specified that the SSC use the new ABC control rule adopted by the Council in Amendment 8 to recommend the OFL and ABCs for 2019-2021. After reviewing the results of the stock assessment and information compiled by the Council's Herring Plan Development Team (PDT), the SSC recommended herring OFLs of 30,688 mt in 2019, 38,878 mt in 2020, and 59,788 mt in 2021. The SSC also

recommended that herring ABCs should not exceed 21,266 mt in 2019, 16,131 mt in 2020, and 16,131 mt in 2021. The SSC was concerned that the new assessment's recruitment projections used a long-term average, rather than weighting recent low recruitment, resulting in a substantial projected biomass increase for 2021. To mitigate its concerns, the SSC recommended maintaining the 2020 ABC (16,131 mt) for 2021, updating the herring assessment in 2020, and investigating herring's recent low recruitment. The assessment update would enable the SSC to reconsider its 2021 ABC recommendation based on updated estimates of recruitment and biomass.

In response to the Council's request for an in-season adjustment of 2018 herring catch limits for 2019, we proposed reduced catch limits for 2019 in November 2018. The herring ABC we proposed for 2019, as well as the resulting ACL and sub-ACLs, while consistent with methods used to set recent specifications, were higher than limits recommended by the Council and SSC. Our proposed herring catch limits were based on an ABC with a 50-percent probability of preventing overfishing (30,688 mt). In contrast, the Council's recommended 2019 catch limits were based on an ABC of 21,266 mt, generated using the new control rule developed in Amendment 8, and estimated to have a 15-percent probability of overfishing. While the sub-ACL values we proposed for 2019 were higher than those recommended by the Council, our proposed method to allocate catch to the sub-ACLs was consistent with Council recommendations. We intended the proposed catch limits to balance preventing overfishing with maintaining a viable herring fishery to achieve optimum yield (OY), while we consider approval and implementation of a long-term ABC control rule in Amendment 8.

The Council discussed our proposed 2019 herring catch limits at its December 2018 meeting, at which time it firmly reiterated its original recommendations that catch limits be

based on an ABC of 21,266 mt and sub-ACL allocations be consistent with recent specifications. The Council explained the necessity of lowering the risks of overfishing and the stock becoming overfished, especially given the uncertainty associated with the assessment's projections of herring biomass and recruitment. It expressed concern that higher catch in 2019 would result in even lower catch limits for 2020. While the Council acknowledged that negative economic impacts on the fishing industry would be greater under the lower catch limits, it stressed that conservation benefits outweighed the short-term revenue considerations. The Council also explained that maintaining recent sub-ACL allocations prevents overfishing on any one sub-component of the herring stock and helps minimize negative economic impacts associated with reduced catch limits by providing fishery access to all gear types and management areas. Following the Council meeting, the Council further detailed its rationale for its recommended 2019 herring catch limits in a December 13, 2018, letter to us.

We work closely with the Council for sustainable management of New England fisheries. The Council develops harvest policies for its fisheries and we tend to defer harvest policy decisions to the Council, unless those policies are inconsistent with the Magnuson-Stevens Fishery Conservation and Management Act or other applicable law. The Council expressed concern with our proposed herring catch limits for 2019 and recommended limits be lowered to prevent overfishing and lower the risk of the stock becoming overfished. After considering the Council's policy concerns and to better account for scientific uncertainty, we are adjusting the 2018 herring specifications and sub-ACLs for 2019 to achieve conservation and management objectives, consistent with the Council's recommendations, Herring FMP objectives, and other Herring FMP provisions. The final 2019 herring catch limits implemented in this in-season adjustment are shown in Table 1 below.

**Table 1.****Final****Atlantic****Herring**

<b>Overfishing Limit</b>	30,668
<b>ABC</b>	21,266
<b>Management Uncertainty</b>	6,200
<b>OY/ACL</b>	15,065*
<b>Domestic Annual Harvest</b>	15,065
<b>Border Transfer</b>	0
<b>Domestic Annual Processing</b>	15,065
<b>U.S. At-Sea Processing</b>	0
<b>Area 1A Sub-ACL (28.9%)</b>	4,354*
<b>Area 1B Sub-ACL (4.3%)</b>	647
<b>Area 2 Sub-ACL (27.8%)</b>	4,188
<b>Area 3 Sub-ACL (39%)</b>	5,876
<b>Fixed Gear Set-Aside</b>	39
<b>Research Set-Aside</b>	3% of sub-ACLs
* If New Brunswick weir fishery catch through October 1 is less than 4,000 mt, then 1,000 mt will be subtracted from the management uncertainty buffer and added to the ACL and Area 1A Sub-ACL.	

**Specifications and Sub-ACLs for 2019 (mt)**

Based on the best available science, we are reducing the OFL for 2019 to 30,668 mt.

Please note that a typographic error in the PDT's October 2018 report changed the ABC with a 50-percent probability of preventing overfishing from 30,668 mt to 30,688 mt. That mistake was

perpetuated in the SSC's OFL recommendation for 2019 and in our November 2018 proposed rule. The correct value for an OFL with a 50-percent probability of preventing overfishing in 2019 is 30,668 mt. The Herring FMP specifies that the OFL must be equal to catch resulting from applying the maximum fishing mortality threshold to a current or projected estimate of stock size. When the stock is not overfished and overfishing is not occurring, this is usually the fishing rate supporting maximum sustainable yield. Catching in excess of this amount is considered to be overfishing. An OFL of 30,668 mt would result in approximately a 50-percent probability of preventing overfishing in 2019. This OFL is based on projections by the SAW/SARC, as updated by NOAA's NEFSC staff using 2018 catch, and is consistent with the SSC recommendation.

The Herring FMP specifies that the ABC may be equal to or less than the OFL depending on scientific uncertainty concerning stock size estimates, variability around recruitment estimates, and consideration of ecosystem issues. We are reducing the ABC to 21,266 mt for 2019. This ABC accounts for scientific uncertainty in the stock assessment's projected estimates of herring biomass and recruitment and we expect it will prevent overfishing, lower the risk of the stock becoming overfished, and reduce catch level variability between 2019 and 2020. Our decision to implement a 2019 ABC consistent with the Council's recommendation for this in-season adjustment is independent of and involves different considerations than our consideration of the Council's recommended control rule in Amendment 8. We expect the Council to submit Amendment 8 to us for review and approval in early 2019.

The Herring FMP specifies that the ACL is reduced from the ABC to account for management uncertainty, and the primary source of management uncertainty is catch in the New Brunswick weir fishery. We are maintaining the current management uncertainty buffer (6,200



mt), as recommended by the Council, so the resulting herring ACL/OY is 15,065 mt for 2019. Catch in the New Brunswick weir fishery is variable. The value of the current buffer is based on average catch during 2009-2011. Like catch in 2010 (10,958 mt), New Brunswick weir catch in 2018 was much higher than average (11,500 mt). Because the average of recent New Brunswick weir catch (2016-2018) is 5,900 mt and years with high weir catches are typically not consecutive, we expect a buffer of 6,200 mt to appropriately account for management uncertainty in 2019.

We are maintaining the sub-ACL allocations used in the recent specifications (2016-2018) for 2019. This means that 28.9 percent of the ACL is allocated to Area 1A, 4.3 percent is allocated to Area 1B, 27.8 percent is allocated to Area 2, and 39 percent is allocated to Area 3. These sub-ACL allocations were recommended by the Council for past specifications, as well as for 2019, because they do not substantially impact one stock component (inshore versus offshore) more than the other while providing fishing opportunities for all gears types and all management areas.

Based on the Council's recommendations, we are reducing border transfer to 0 mt and the fixed gear set-aside to 39 mt for 2019. Border transfer is a processing quota and is the maximum amount of herring that can be transshipped to Canada via Canadian carrier vessels for human consumption. Border transfer has been under-utilized in recent years, and there has been no border transfer since 2015. Reducing the border transfer to 0 mt for 2019 would ensure all herring caught in U.S. waters are available to U.S. federally permitted dealers for lobster bait or human consumption. Additionally, we are proportionally reducing the fixed gear set-aside, relative to the Area 1A sub-ACL, to 39 mt. The Herring FMP allows up to 500 mt of the Area 1A sub-ACL to be allocated for the fixed gear fisheries in Area 1A (weirs and stop seines) that

occur west of 67°16.8' W. long (Cutler, Maine). This set-aside is available for harvest by fixed gear within the specified area until November 1 of each fishing year. Any portion of this allocation that has not been harvested by November 1 is transferred back to the sub-ACL allocation for Area 1A. We expect that reducing the fixed gear set aside will allow additional herring harvest to be available to both fixed and mobile gears in Area 1A helping ensure OY is achieved. As with the border transfer, the fixed gear set-aside has been under-utilized in recent years. Fixed gear landings tracked against the set-aside have averaged less than 12 mt in the past 5 years.

The Herring FMP requires we adjust for catch overages and underages in a subsequent year. Total catch in 2017 did not reach or exceed any of the management area sub-ACLs, so typically we would carryover those underages, or a portion of the underages, to increase sub-ACLs in 2019. However, to help ensure catch does not exceed the ABC in 2019, we are not increasing any sub-ACLs in 2019 to adjust for underages in 2017.

Values for domestic annual harvest and domestic annual processing in 2019 are adjusted consistent with the specifications for OY and border transfer. All other herring specifications for 2019, including the river herring and shad catch caps, remain unchanged from 2018.

### **Changes from the Proposed Rule**

This in-season adjustment implements herring specifications and sub-ACLs for 2019 that are lower than our proposed 2019 herring limits. All changes from the proposed rule are consistent with Council recommendations and intended to lower the risks of overfishing and the stock becoming overfished. Changes between our proposed and final herring specifications and sub-ACLs are shown in Table 2 below. While the values for sub-ACLs and the fixed gear set-

aside are different than those proposed, the methods to allocate sub-ACLs and adjust the fixed gear set-aside are the same. The specifications for management uncertainty, domestic annual harvest, border transfer, domestic annual processing, and research set-aside are the same as those proposed. All other specifications, including river herring and shad catch caps, remain unchanged from 2018.

**Table 2. Difference in Proposed and Final Atlantic Herring Specifications and Sub-ACLs for 2019**

<b>Specifications</b>	<b>Proposed for 2019 (mt)</b>	<b>Final for 2019 (mt)</b>	<b>Difference (mt)</b>
<b>OFL</b>	30,688	30,668	-20*
<b>ABC</b>	30,688	21,266	- 9,422
<b>OY/ACL</b>	24,488	15,065	- 9,423
<b>Domestic Annual Harvest</b>	24,488	15,065	- 9,423
<b>Domestic Annual Processing</b>	24,488	15,065	- 9,423
<b>Area 1A Sub-ACL (28.9%)</b>	7,077	4,354	- 2,723
<b>Area 1B Sub-ACL (4.3%)</b>	1,053	647	- 406
<b>Area 2 Sub-ACL (27.8%)</b>	6,808	4,188	- 2,620
<b>Area 3 Sub-ACL (39%)</b>	9,550	5,876	- 3,674
<b>Fixed Gear Set-Aside</b>	64	39	- 25
* Difference due to correcting a typographical error in the value of the OFL.			

Projections used to generate the proposed 2019 ABC assumed 49,900 mt of herring catch in 2018. After publication of the proposed rule, we learned that total herring catch for 2018, including 11,500 mt of catch in the New Brunswick weir fishery that is not counted against the ACL but used for assessing status of the herring stock, actually totaled 54,896 mt. This means that the proposed ABC likely has less than a 50-percent probability of preventing overfishing in 2019. We intended to explore ABC options for this final rule that were lower than 30,688 mt but higher than 21,266 mt, in hopes of finding a balance between conserving the herring stock and minimizing negative economic impacts on the fishing industry. However, the lapse in appropriations resulting in the partial government shutdown starting on December 22, 2018,

prevented us from working with staff from the NEFSC to analyze additional alternatives. Setting the final ABC lower than the OFL better accounts for scientific uncertainty to ensure catch limits will prevent overfishing and meet the Herring FMP's goals and objectives.

### **Herring Research Set-Aside Exempted Fishing Permits**

In the proposed rule, we solicited public comment on exempted fishing permits (EFPs) used to exempt vessels from certain herring management regulations to support herring research set-aside (RSA) compensation fishing. Consistent with previous herring RSA EFPs, vessels would be allowed to harvest herring RSA in a management area after a sub-ACL had been caught and the herring fishery is limited to 2,000 lb (907 kg) of herring per day/trip in that area. EFPs would also allow vessels to harvest RSA during times when the sub-ACLs are not seasonally available for harvest, specifically during January through May in Area 1A and January through April in Area 1B. We received no comments on the EFPs, so we intend to issue EFPs to facilitate herring RSA compensation fishing in support of the projects funded under the 2019 Herring RSA Program.

### **Comments and Responses**

We received 22 comment letters on the proposed rule: 11 from participants in the herring and lobster fisheries; 2 from fishing industry organizations (Maine Lobstermen's Association (MLA) and New England Purse Seiner's Alliance (NEPSA)); 2 from states (Massachusetts Division of Marine Fisheries (MA DMF) and Maine Division of Marine Resources (ME DMR)); 2 from environmental advocacy groups (Conservation Law Foundation (CLF)/Natural Resources Defense Council (NRDC) and Earthjustice); 2 from participants in other fisheries (tuna and recreational); 1 from the Council; 1 from the Town of Wellfleet; and 1 from a member of the public.

*Comment 1:* Several commenters supported the Council's recommended herring ABC of 21,266 mt including: MA DMF; CLF/ NRDC; Earthjustice; Town of Wellfleet; and one recreational fisheries participant. These commenters echoed the Council's rationale for supporting a lower ABC in 2019 and that rationale is as follows:

- A buffer is needed between the OFL and ABC to account for scientific uncertainty associated with the assessment's recruitment and biomass projections;
- The lower ABC performs better across several metrics than the proposed ABC, including lower probability of overfishing (15 percent versus 50 percent) and lower variability in yield (between 2019 and 2020);
- Maintaining fishing mortality at the rate to support maximum sustainable yield is not consistent with the Council's risk tolerance for herring and applying a lower fishing mortality rate would help the stock rebuild more quickly;
- Actual catch in 2018 exceeded 49,900 mt so the proposed ABC would have less than a 50-percent probability of preventing overfishing in 2019;
- It is uncertain what higher than average catch in the New Brunswick weir fishery will mean for stock recruitment;
- The 2020 ABC can be higher under the lower ABC than under the proposed ABC;
- The higher ABC results in additional risk to the stock that is not justified given the marginal increase in short-term revenue; and
- The lower ABC balances the goals and objectives of the Herring FMP.

Additionally, MA DMF commented that the herring stock is less likely to become overfished under the lower ABC than under the proposed ABC, especially if recruitment projections are not realized. It also speculated that the lower ABC in 2020, resulting from higher limits in 2019, may cause more economic hardship, threaten the viability of the herring fishery, and have serious implications for vessels fishing for mackerel. Earthjustice and CLF/NRDC contend that the Magnuson-Stevens Act prohibits ACLs from being set higher than ABC recommendations by the SSC. The Town of Wellfleet commented that the lower ABC better provides for herring predators than the proposed ABC.

*Response:* We understand the comments made by these stakeholders and why they advocate for a lower herring ABC in 2019, even though we do not agree that the Magnuson-Stevens Act prohibits us from setting harvest limits higher than those recommended by the SSC in this in-season adjustment.

For all the reasons we previously described, we are implementing the lower ABC (21,266 mt) recommended by the Council for 2019.

*Comment 2:* Several commenters supported the proposed ABC of 30,688 mt including: ME DMR; NEPSA; MLA; some participants in the herring and lobster fisheries; and one participant in the tuna fishery. Their rationale for supporting a higher ABC in 2019 is as follows:

- The 2019 ABC should be set consistent with recent specifications until the new control rule is reviewed and approved as part of Amendment 8;
- The maximum fishing mortality rate of 80 percent associated the new control rule is redundant as the stock assessment already accounts for the consumption of herring by predators;

- The lower ABC is too restrictive, in hopes of rebuilding the stock by limiting fishing, but herring recruitment is primarily environmentally-driven;
- The higher ABC helps achieve OY by accounting for social, economic, and ecological factors while preventing overfishing and mitigating severe economic hardship on the herring and lobster fisheries;
- The higher ABC helps support a mackerel fishery in 2019;
- The new control rule would not have prevented the current condition of the herring stock and it is an overreaction to the 2018 stock assessment without consideration for the economic impacts on herring, lobster, and mackerel fisheries;
- Leaving an extra 9,000 mt of herring in the water will not make an appreciable impact on the future health of herring stock, but not doing so will devastate the herring and lobster fisheries;
- The economic impacts of the lower ABC on the fishing industry will be severe with participants in the herring fishery struggling to maintain their businesses, crews, and facilities and the lobster fishery losing access to millions of pounds of lobster bait resulting in high prices and shortages; and
- A higher ABC in 2019 would allow the lobster industry time to identify alternative sources of bait, coordinate bait distribution, and grow infrastructure and storage capacity to minimize the economic impacts of reduced herring catch limits.

*Response:* We also understand the comments made by these stakeholders and why they advocate for a higher herring ABC in 2019. While the impacts of less catch and less revenue

associated with either ABC alternative will negatively impact the fishing industry, we agree with the commenters that economic impacts on the fishing industry will likely be more severe with implementation of the lower ABC. Because actual catch in 2018 was higher than anticipated, the proposed ABC of 30,688 mt likely has less than a 50-percent probability of preventing overfishing in 2019. This means that the higher ABC is no longer a viable alternative for 2019. The partial government shutdown that began on December 22, 2018, prevented us from analyzing additional ABC alternatives. Therefore, to better account for scientific uncertainty and prevent overfishing and lower the risk of the stock becoming overfished, we are implementing the lower ABC recommended by the Council for 2019.

*Comment 3:* The Council and some participants in the herring trawl fishery expressed support for maintaining recent sub-ACL allocations. They commented that the proposed sub-ACL allocations provide harvesting opportunities for vessels fishing in offshore areas, small-mesh bottom trawl fishing in Area 2, and vessels fishing for mackerel in Area 2.

*Response:* We acknowledge these comments and are maintaining the recent herring sub-ACL allocations in 2019.

*Comment 4:* Several commenters opposed maintaining the recent sub-ACLs allocations including the MLA, NEPSA, ME DMR, some participants in the herring purse seine fishery, some participants in the lobster fishery, and one participant in the tuna fishery. They commented that more herring should be allocated to Area 1A because:

- Recent allocations do not reflect the availability of the herring resource or the effort of the herring fishery;



- Recent allocations do not equally distribute the impact of a low ABC across states, so Maine will be more severely impacted than other states because of its need for lobster bait;
- If the largest percentage of the ACL is not allocated to Area 1A, the ACL may not be harvested;
- Purse seine vessels will be more impacted by a low ABC than trawl vessels because they only fish in Area 1A;
- Timing of the Area 1A fishery coincides with the lobster fishery's need for fresh bait;
- Allocating the most harvest to Area 1A will help lessen the impact of the ABC reduction on the lobster fishery; and
- Unharvested catch should be transferred into areas where it can be harvested.

*Response:* We understand the concerns expressed in these comments. Because sub-ACL allocations have the potential for biological impacts on the herring stock and economic impacts on the fishing industry, we are deferring to the Council's recommendations for sub-ACL allocations. The Council will soon begin developing herring specifications for 2020-2021 and will likely reconsider sub-ACL allocations at that time. Because herring revenue makes up a larger percentage of total revenue for purse seine vessels than trawl vessels, we agree that purse seine vessels may be more negatively affected by low catch limits than trawl vessels. We disagree that sub-ACL allocations will prevent the ACL from being harvested in 2019 because recent catch (2016-2018) in each of the management areas has been higher than the 2019 sub-ACLs, with the exception of Area 2 in 2017. But if there is unharvested herring catch available

in any of the management areas near the end of the fishing year, the Council could request we use an additional in-season adjustment to reallocate unharvested catch.

*Comment 5:* Earthjustice and CLF/NRDC commented on the river herring and shad catch caps for 2019. They cautioned that maintaining the current catch caps would allow disproportionately high catch of river herring and shad, compared to herring catch, and would not encourage vessels to avoid river herring and shad catch or minimize bycatch in violation of the Magnuson-Stevens Act.

*Response:* We disagree with these comments. In January 2017, midwater vessels had only harvested about 3,000 mt of herring from Area 3 when their catch of river herring and shad approached 80-percent of the Cape Cod catch cap. Because the midwater trawl fleet quickly modified their fishing behavior to avoid river herring and shad, they were able to avoid fully harvesting the Cape Cod catch cap for the remainder of 2017. In March 2018, midwater trawl vessels fully harvested the Southern New England catch cap, triggering the 2,000-lb herring possession limit in the catch cap closure area, in combination with less than 6,500 mt of herring from Area 2. Herring catch from Area 2 remained low for the rest of the year and totaled approximately 7,000 mt at the end of 2018. These examples illustrate that even at low levels of herring catch, the current river herring and shad catch caps provide an incentive to avoid river herring and shad and minimize bycatch.

*Comment 6:* The Council expressed support for reducing border transfer to zero so that more herring would be available to the bait market. Both the Council and ME DMR expressed support for a fixed gear set-aside and the Council noted that the fixed gear set-aside should be reduced in proportion to the ABC.

*Response:* We acknowledge these comments and are reducing border transfer to zero mt and implementing a fixed gear set-aside of 39 mt for 2019, reduced proportionally relative to the Area 1A sub-ACL.

*Comment 7:* The NEPSA and one participant in the herring fishery supported the in-season transfer of unharvested herring.

*Response:* We expect the fishery to be able to fully harvest the ACL/OY in 2019, but if there is unharvested herring catch available in any of the management areas near the end of the fishing year, the Council could request we use an additional in-season adjustment to reallocate unharvested catch.

*Comment 8:* One participant in the herring fishery expressed support for the research set-aside because of the value of the compensation fishery, especially if it helps provide access to the mackerel fishery.

*Response:* We acknowledge this comment and are setting aside 3-percent of each sub-ACL for research, consistent with recent specifications.

*Comment 9:* Several commenters expressed concern with weekly landing limits and measures restricting the activity of herring carrier vessels in Area 1A.

*Response:* Because these measures are recommended by the Atlantic States Marine Fisheries Commission and implemented and enforced by individual states, they are outside the scope of this action.

## **Classification**

The Administrator, Greater Atlantic Region, NMFS determined that this final rule is necessary for the conservation and management of the herring fishery and that it is consistent with the Magnuson-Stevens Act and other applicable law.

There is good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effectiveness so the purpose of this action is not undermined. This action reduces 2018 herring specifications and sub-ACLs to prevent overfishing in 2019 with the goals of increasing herring biomass and providing future fishery opportunities. This action must be in effect as soon as practicable to realize these intended benefits. Because this action reduces catch limits that directly relate to preventing overfishing while allowing the herring fishery to achieve OY, a 30-day delay would be contrary to the public interest.

The 2018 herring stock assessment concluded that catch would need to be reduced in 2019 to prevent overfishing and lower the risk of the stock becoming overfished. Before taking this action, we consulted with the Council at its September and December 2018 meetings. At those meetings, the Council requested that we use an in-season adjustment to reduce 2018 herring specifications and sub-ACLs for 2019 to prevent overfishing and lower the risk of the stock becoming overfished.

A delay in implementing these new herring catch limits will increase the likelihood that 2019 herring catch will exceed these lower limits. These new catch limits are almost 70 percent lower than 2018 catch limits. Exceeding these limits would result in a lower herring biomass and negative economic impacts on the herring industry due to further reduced catch limits in 2020 and beyond. Because herring is a critical source of bait for the lobster fishery, these negative economic impacts are also expected to affect the lobster fishery by reducing its bait supply.

Additionally, we are required to implement a 2,000-lb (907-kg) herring possession limit for the remainder of the year in each management area once we project 92-percent of an area's sub-ACL is harvested. We are also required to implement a 2,000-lb (907-kg) herring possession limit for the remainder of the year in all management areas once we project 95-percent of the herring ACL is harvested. If a delay in implementing this action results in catch approaching, or exceeding, the new 2019 catch limits, implementation of a herring possession limit is more likely. Early implementation of a herring possession limit would be counter to the goals and objectives of this action, which is intended to reduce 2019 catch, but also continue to provide fishing opportunities for the remainder of the 2019 fishing year.

This action is necessary to help rebuild the herring stock and maintain the viability of the herring fishing industry and other fisheries that rely on herring. Waiving the 30-day delay in effectiveness is necessary to fully achieve the conservation and economic benefits this action is intended to provide. A 30-day delay in effectiveness is unnecessary because it provides no benefit to herring conservation or the herring fishing industry. Conversely, a 30-day delay could result in a lower herring biomass and negative economic impacts to the herring industry due to further reduced catch limits in 2020 and beyond. For these reasons, NMFS has determined that a 30-day delay in the effectiveness of this action is contrary to the public interest.

This final rule is exempt from review under Executive Order 12866.

A final regulatory flexibility analysis (FRFA) was prepared in support of this action. The FRFA incorporates the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA, NMFS responses to those comments, and a summary of the analyses completed in support of this action. A description of why this action was considered, the objectives of, and the legal basis for this rule is contained in in the preamble to the proposed and

this final rule, and is not repeated here. All of the documents that constitute the FRFA and a copy of the SEA/RIR/IRFA are available upon request (see **ADDRESSES**) or via the Internet at <https://www.nefmc.org>.

*A Statement of the Significant Issues Raised by the Public in Response to the IRFA, a Statement of the Agency's Assessment of Such Issues, and a Statement of Any Changes Made in the Final Rule as a Result of Such Comments*

We received 22 comment letters on the proposed rule. Those comments, and our responses, are contained in the Comments and Responses section of this final rule and are not repeated here. All changes from the proposed rule, as well as the rationale for those changes, are described in the Changes from the Proposed Rule section of this final rule and are not repeated here.

*Description and Estimate of Number of Small Entities to Which the Rule Would Apply*

The RFA recognizes three kinds of small entities: Small businesses; small organizations; and small governmental jurisdictions. For purposes of the RFA only, the small business criteria in the finfish fishing industry (NAICS 114111) is a firm that is independently owned and operated and not dominant in its field of operation, with gross annual receipts of \$11 million or less. Small organizations and small governmental jurisdictions are not directly regulated by this action.

There are five permit categories in the herring fishery: (1) Limited access permit for all management areas (Category A); (2) limited access permit for access to Areas 2 and 3 only (Category B); (3) limited access incidental catch permit for 25 mt per trip (Category C); (4) an open access incidental catch permit for 3 mt per trip (Category D); and (5) an open access permit

for limited access mackerel permit holders authorizing up to 9 mt per trip (Category E) in Areas 2 and 3.

In 2017, there were a total of 1,566 permitted herring vessels. Of those, 1,434 were exclusively Category D vessels. Of the remaining 132 permitted herring vessels, 22 belonged to large businesses. Every Category B permit was also authorized for Category C, and all but one Category E permitted vessel also carried a Category D authorization. We included Category E vessels that also have Category D authorization in the analysis. Table 3 presents the counts of permitted vessels by category along with their affiliated entity's small or large business status (the status of the company that holds the herring permit).

**Table 3. Number of Herring Permits by Category, 2015-2017**

<b>Herring Permit Categories</b>	<b>Number of Herring Permits</b>					
	<b>2015</b>		<b>2016</b>		<b>2017</b>	
	<b>Large</b>	<b>Small</b>	<b>Large</b>	<b>Small</b>	<b>Large</b>	<b>Small</b>
<b>A</b>	5	32	5	30	6	30
<b>B/C</b>	4	4	4	4	4	4
<b>C (exclusive)</b>	3	37	3	37	3	37
<b>D (exclusive)</b>	112	1222	115	1306	114	1320
<b>E</b>	9	39	9	40	9	39
<b>Total</b>	133	1334	136	1417	136	1430

*Source: NMFS*

Table 4 refines the counts from Table 3 to include only those vessels that had revenue from herring at least once in the 3-year period of analysis. In 2017, there were 4 large businesses and 69 small that had revenue from herring.

**Table 4. Number of Herring Permits with Herring Revenue, 2015-2017**

<b>Herring Permit Categories</b>	<b>Number of Herring Permits</b>					
	<b>2015</b>		<b>2016</b>		<b>2017</b>	
	<b>Large</b>	<b>Small</b>	<b>Large</b>	<b>Small</b>	<b>Large</b>	<b>Small</b>
<b>A</b>	4	20	4	19	4	19
<b>B/C</b>	0	2	0	2	0	3
<b>C (exclusive)</b>	0	11	0	9	0	12
<b>D (exclusive)</b>	0	27	0	29	0	31
<b>E</b>	0	4	0	1	0	4
<b>Total</b>	4	64	4	60	4	69

*Source: NMFS*

Finally, Table 5 defines the small entities affected by this proposed action - small businesses with a Herring Category A, B, C, or E permit and revenue from herring during the 2015-2017 period of analysis. There were 37, 31, and 38 such vessels in 2015, 2016, and 2017 respectively.

**Table 5. Affected Small Entities, Permitted Herring Vessels with Herring Revenue, 2015-2017**

<b>Herring Permit Categories</b>	<b>Number of Herring Permits</b>					
	<b>2015</b>		<b>2016</b>		<b>2017</b>	
	<b>Large</b>	<b>Small</b>	<b>Large</b>	<b>Small</b>	<b>Large</b>	<b>Small</b>
<b>A</b>	4	20	4	19	4	19
<b>B/C</b>	0	2	0	2	0	3



<b>C (exclusive)</b>	0	11	0	9	0	12
<b>E</b>	0	4	0	1	0	4
<b>Total</b>	4	37	4	31	4	38

*Source: NMFS*

To better understand the impact of this action on the affected small businesses, we compared the revenue from herring fishing to total revenue brought in by the entity (business) that holds the herring permit. The 17 to 18 small entities with Category A permits show the most dependence on the herring fishery, with 49.75 percent to 62.03 percent of their revenue coming from herring landings. The 4 small Category E permitted entities have the least dependence on the herring fishery with less than one percent of total entity revenue coming from the herring fishery.

*Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements*

This final rule does not introduce any new reporting, recordkeeping, or other compliance requirements.

*Description of the Steps the Agency Has Taken to Minimize the Significant Economic Impact on Small Entities Consistent with the Stated Objectives of Applicable Statutes*

Regulations at 50 CFR 648.200(e) allow us to make in-season adjustments to the herring specifications and sub-ACLs to achieve conservation and management objectives, after consultation with the Council, consistent with the Herring FMP's objectives and other FMP provisions. Specifications and sub-ACLs must also be based on the best available scientific information, consistent with National Standard 2 of the Magnuson-Stevens Act. The adjustments to 2018 herring specifications and sub-ACLs for 2019 implemented in this final rule satisfy regulatory and statutory requirements while achieving conservation and management objectives.

Other options that we considered, including those that would have had less of an impact on small entities, failed to meet one or more of these stated objectives and, therefore, could not be implemented.

Alternative 1 (2018 catch limits) has less than a 50-percent probability of preventing overfishing in 2019 and, thus, is inconsistent the Magnuson-Stevens Act. Alternative 1 would also negatively impact the herring stock by increasing the risk that it would become overfished. The primary difference between Alternative 2 (final 2019 catch limits) and Alternative 3 (catch limits based on an ABC of 30,668) are specifications for ABC and the resulting ACL and sub-ACLs for 2019. The ABC associated with the Alternative 3 (30,668 mt) is 9,402 mt higher than the ABC associated with Alternative 2 (21,266 mt). Projections used to generate Alternative 3 assumed 49,900 mt of herring catch in 2018. After publication of the proposed rule, we learned that total herring catch for 2018, including catch in the New Brunswick weir fishery, actually totaled 54,896 mt. This means that Alternative 3, like Alternative 1, has less than a 50-percent probability of preventing overfishing in 2019 and is also inconsistent with the Magnuson-Stevens Act. In its comment letter on the proposed rule, the Council also cautioned that Alternative 3's higher ABC is inconsistent with the Council's risk tolerance for the herring resource. While Alternatives 1 and 3 would have allowed for higher total revenue and higher herring revenue than Alternative 2, Alternative 2 is the only alternative that meets the conservation and management objectives of the regulatory and statutory requirements. The impacts of adjustments to herring specifications and sub-ACLs for 2019, as implemented by this final rule, are not expected to disproportionately affect large or small entities.

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA,

the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as “small entity compliance guides.” The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a letter to permit holders that also serves as small entity compliance guide was prepared. Copies of this final rule are available from the Greater Atlantic Regional Fisheries Office (GARFO), and the compliance guide (i.e., fishery bulletin) will be sent to all holders of permits for the herring fishery. The guide and this final rule will be posted on the GARFO website.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: February 5, 2019.

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[FR Doc. 2019-01658 Filed: 2/7/2019 8:45 am; Publication Date: 2/8/2019]